No. 77-1387

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1387

THE FEDERAL OPEN MARKET COMMITTEE OF THE FEDERAL RESERVE SYSTEM, PETITIONER

v.

DAVID R. MERRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondent relies heavily (Resp. Br. 5, 12-15) on the Court's statement in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975), that "[w]e should be reluctant * * * to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)," which includes "statements of policy and interpretations which have been adopted by the agency." As the previous portions of its opinion clearly indicate, however, the Court's "reluctance" was based on the congressional concern that the withholding of "statements of policy"—that is, "the 'working law' of the agency" (*ibid.*)—would result in "secret agency law." Perhaps the primary purpose of the Freedom of Information Act, as the Court noted, was "to require disclosure of documents which have 'the force and effect of law.' " *Ibid.*, quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966).

Here, of course, there is no threat of "secret agency law," since the FOMC releases each month's Domestic Policy Directive and tolerance ranges within a few days after the following month's meeting. But more important, as we pointed out in our main brief (page 38), the Directive and tolerance ranges do not govern the adjudication of individual rights or require particular conduct or forbearance by the public and thus are not "law." Respondent concedes that many "final" agency decisions, such as "GSA's decision to acquire specific real estate and the price ranges it expected to pay" (Resp. Br. 23), do not qualify as "statements of agency policy." By the same token, the FOMC's monthly directions to its Account Manager are not the "working law" of the agency and do not have a direct impact on the conduct of private persons. Hence, application of Exemption 5 to delay their disclosure for a short period of time would not encounter *Sears'* "reluctance" to apply the exemption to "agency policy."

2. Although respondent does not dispute that the problem of premature disclosure of the FOMC's monthly Domestic Policy Directive was mentioned explicitly during the congressional hearings on the Act, he contends that other aspects of the legislative history demonstrate that these statements are entitled to little weight. For one thing, respondent argues, "[i]n discussing particular exemptions which might allow the government to withhold information relating to * * * gold purchases, the Treasury Department respresentative did not discuss or question Exemption 5" (Resp. Br. 22). For another, "the Federal Reserve Board [did not] itself mention the need for deferred disclosures or problems in Exemption 5 in its correspondence commenting on the original Freedom of Information legislation" (*ibid.*). Respondent's second assertion is inaccurate and his first assertion is beside the point.

To begin with, it is not surprising that the Treasury Department spokesman before the House Committee did not specifically discuss Exemption 5, either in connection with the gold purchase issue or in the further colloquy cited by respondent. In both instances, the questioning concerned claims not of premature disclosure, which is the situation here, but of nondisclosure, and the reasons offered by the Treasury to support its request for nondisclosure in matters such as "records of how the ink and paper are prepared for the production of currency" (*Hearings on H.R. 5012 Before a Subcomm. of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 51 (1965)), "records which pertain to private corporations and individuals" (*ibid.*), "taxpayer's files" (*id.* at 54), and "trade secrets" (*id.* at 55), related to interests other than those dealt with by Exemption 5.

Moreover, respondent's charge that the Board itself did not inform Congress of any problems that might arise as a result of the Act is refuted by the letter sent to the House Committee by Federal Reserve Chairman William McChesney Martin, Jr. on March 10, 1965. "Applied to this Board," Chairman Martin wrote, "there is reason to believe that a literal construction of the eight exemptions from disclosure contained in H.R. 5012 could leave exposed to indiscriminate public demand certain critical records and materials relating to the Board's credit and monetary policy functions, as well as to other of its statutorily directed functions. Such a result could impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body." *Hearings on H.R. 5012, supra,* at 247. In addition, a staff analysis of the comments on the Act submitted by a number of federal agencies, including the Federal Reserve Board, reported that some government representatives had predicted that "[t]rouble in the business world" would

result from public access to the "business, financial, and income tax information which the bill would disclose prematurely * * *" (*id.* at 266).[1]

3. Exemption 5 is designed to protect from mandatory disclosure internal government documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Accordingly, it "exempt[s] those documents * * * normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 149) and "contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *EPA* v. *Mink,* 410 U.S. 73, 91 (1973).

Although respondent does not deny that these principles must guide the construction of Exemption 5, he concludes (Resp. Br. 32) that "the FOMC has not cited a single case in which a court, either under the Federal Rules of Civil Procedure or under the Freedom of Information Act, has delayed or refused discovery of a federal agency's written statements of its policy." It is certainly true that the precise situation presented here has not arisen in any reported decision, but the cases we did cite in our opening brief (pages 30-37) illustrate the district court's broad power in related contexts to fashion a discovery remedy, including an appropriate protective

[1]Respondent's position also is not aided by statements in the legislative history of the 1974 amendments to the Act (Resp. Br. 23-24). Those comments, as well as the 1974 amendments themselves, merely reflect Congress' impatience with administrative delays in processing requests for documents immediately disclosable under the Act, not with purposeful delays occasioned by a desire to avoid frustrating the effective implementation of an agency's policy.

order, to satisfy the competing interests. This, then, is the essential question: if in civil litigation between a private party and the FOMC the private party were to seek immediate discovery of the Committee's current Domestic Policy Directive and tolerance ranges, would a court have discretion to delay production of those materials for a few weeks until the Directive was no longer in effect? The answer to that question is plainly yes, and the same approach should govern access to these documents under the Act.

4. We doubt the propriety, at this stage of the proceedings, of respondent's attempt for the first time to rebut the FOMC's consistent contention that premature disclosure of its Domestic Policy Directive and tolerance ranges would be detrimental to the public interest. Respondent had full opportunity to offer evidence to the contrary in the district court, yet he chose not to do so, asserting (as he concedes, Resp. Br. 33 n.12) that the matter is irrelevant to the legal issues presented. Both lower courts agreed with respondent and held that, even if the immediate release of the Directive and tolerance ranges would frustrate important governmental policies, the Act prohibits any delay in disclosure (Pet. App. 18A, 43A). The record thus requires this Court also to decide the case on the assumption that disclosure of the Directive and tolerance ranges during the period of their effectiveness would inhibit the successful accomplishment of the FOMC's monetary goals.

Having said this, we do not wish to leave unrebutted the impression, fostered by respondent's presentation, that the entire academic and financial community agrees with respondent that the FOMC's delayed disclosure policy is unwise or even counterproductive. Although we question whether much weight should be given to conclusory remarks made in passing by a few persons while commenting on legislation directed to a different problem,

as respondent has done (Resp. Br. 37-41),[2] we note that several of these comments supported the FOMC's view. For example, Professor Donald D. Hester informed the House Committee that "[s]uccessful discretionary policy depends in part on being able to implement a strategy which smoothly achieves a goal. With immediate disclosure of a new set of goals, it is possible that serious and severe disruptions could be precipitated in financial markets. * * * I therefore feel that the Board should continue its practice of providing records of broad policy actions and summaries of views with a lag of 30 days." *Hearings on H.R. 9465 and H.R. 9589 Before a Subcomm. of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 212-213 (1977). Other experts expressed similar thoughts. See *id.* at 189-190 (Professor George L. Bach); *id.* at 198 (J. Dewey Daane); *id.* at 222 (Professor A. Leijonhufvud); *id.* at 303-304 (Charles J. Scanlon). Of course, none of these offhand conclusions, either for or against immediate disclosure, can compare with the detailed affidavits submitted below by the FOMC officials charged with the responsibility of promoting the efficiency and success of the Federal Reserve System's open market operations (A. 49-51, 53-54, 56-58).

---

[2]The sole exception is the statement, in the book written by former Board member Sherman Maisel, that most market experts believe that the immediate disclosure of changes in Federal Reserve policies would not lead to unfair advantages by market speculators (Resp. Br. 35-36, quoting S. Maisel, *Managing the Dollar* 174-175 (1973)). This opinion, however, does not address the more important problem whether immediate disclosure would impair the effectiveness of open market operations. It is also significant that, while urging a freer disclosure policy for the FOMC, Maisel had "recognize[d] the strong opposing arguments * * *." *Hearings on H.R. 9465 and H.R. 9589 Before a Subcomm. of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 225 (1977).

For the foregoing reasons, and those set forth in the government's main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978